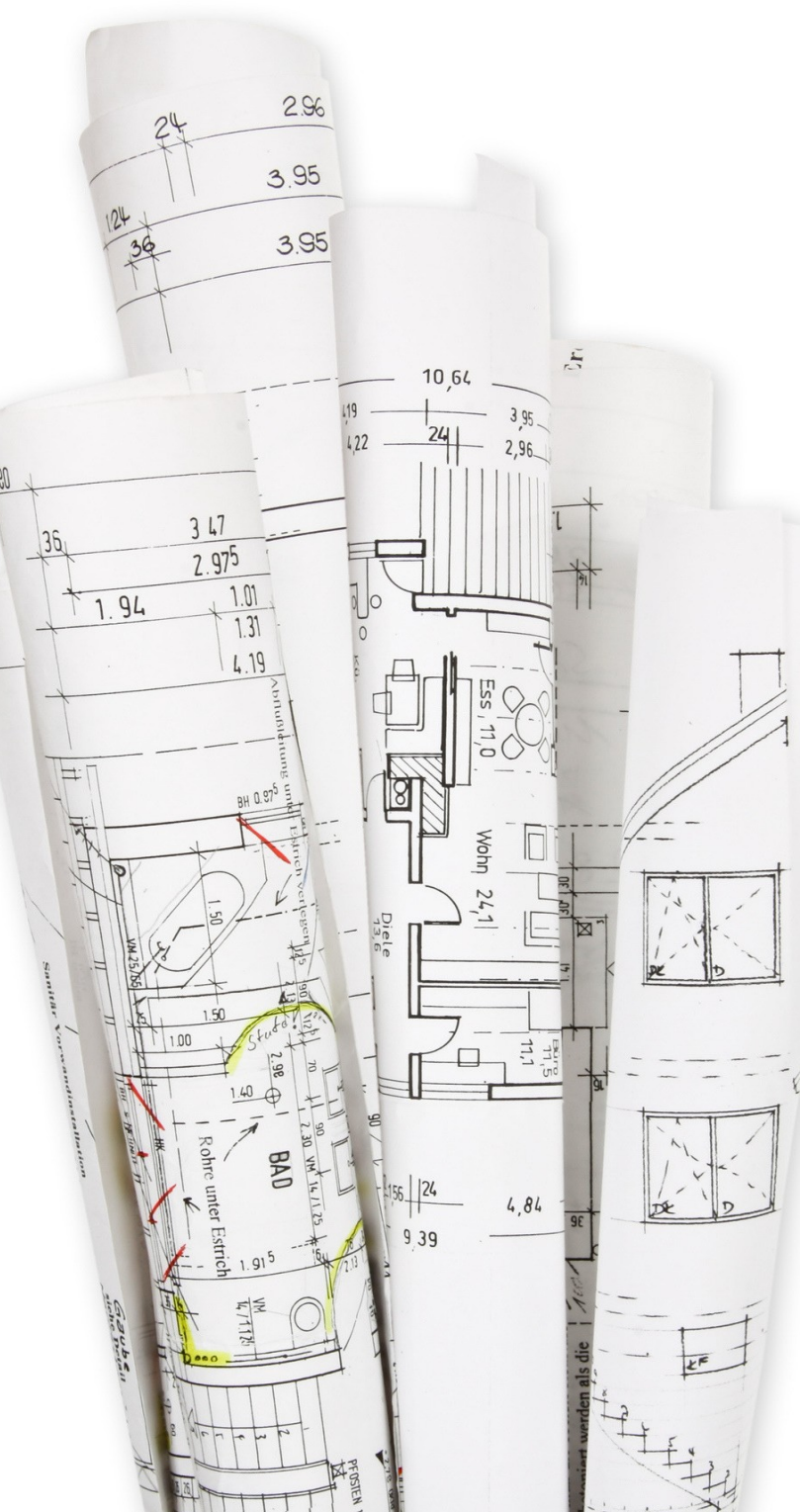


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THE “TIME OF THE ESSENCE” PROVISION IN A DESIGN PROFESSIONAL AGREEMENT

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In my architects and engineers (A/E) risk management folder, I have a number of subjects related to the topic of “time.” Since the March 2021 Building Blocks’ article I covered “Fast-Track Scheduling is Not a Project Delivery Method,” I realized that there are much more “time” related topics in the life of a design and construction project that I would like share with design professionals. This risk management article focuses on a “time” related topic—“time of the essence.”

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WHAT IT MEANS & WHY IT IS UNFAVORABLE TO A/E'S

An agreement between an A/E and their client (actually their client's lawyer) many times includes a "time of the essence" clause. The client's expectations should be matched up with the A/E's standard of care, but that is not always the case. The following two contract clauses are crafted as follows:

1.5.4 Design-Builder and Design Consultant mutually agree that **time is of the essence** with respect to the dates and times set forth in the Design Schedule, Project Schedule and Contract Documents. Each party agrees to provide the other party with information in a timely fashion and in the form and manner as reasonably required. *Design Build Institute of America (DBIA), Document No. 540, Standard Form of Agreement Between Design-Builder & Design Consultant*

Another example (more onerous than the above):

Time is of the essence of this Agreement. The A/E shall perform the phases of its Basic Services and particular design tasks that are part thereof by no later than the dates set forth for the strict completion of each such phase, and such particular design tasks in accordance with the Master Project Schedule, without limitation, all in accordance with the A/E's covenants, assurances and best efforts in the interests of the Project. *(An actual contract clause sent to me by one of my clients, authored by the architect's attorney.)*

These contract provisions transform what should be a flexible schedule and milestones into an obligation with real ramifications. In the life of a design and construction project with its disruptions, unknown conditions, delays and shutdowns may become a dispute with finger pointing, leading to a claim.

A "time is of the essence" provision can be construed to convert any schedule slippage past a stated time constraint into a material breach of the contract. Thus, any minor delay could be used by the client as the basis for a claim for damages or as justification for termination of the agreement. The law only requires that design professional services be provided with reasonable promptness based on specific facts and circumstances. In addition, because professional liability insurance only provides coverage for claims resulting

from the negligence of the design professional, claims for breach of contract may result in an uninsurable exposure. Tying schedule obligations to be consistent with professional skill and care helps differentiate professional services from that of a contractor, and helps tie the performance obligations to the standard of care. Victor O. Schinnerer



"My Time Ran Out, But Nothing Happened" Photo by Eric O. Pempus, DesignPro Insurance Group, 9.28.2021

COUNTERING A “TIME OF THE ESSENCE” PROVISION

A preferred approach to handle a “time of the essence” clause is to replace it by the following sample provision:

Services will be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Project. Notwithstanding anything to the contrary contained herein, the A/E shall not be deemed in default of this Agreement to the extent that any delay or failure in the performance of its obligations results from any cause beyond its reasonable control and without its negligence.

Remember that the American Institute of Architects’ B101 (2017) Standard Form of Agreement Between Owner & Architect, Article 3.1.3, does not state that the architect will perform its services in accordance with a strict project schedule. Rather, it states that:

As soon as practicable after the date of this Agreement, the Architect shall submit for the Owner's approval a schedule for the performance of the Architect's services. The schedule initially shall include anticipated dates for the commencement of construction and for Substantial Completion of the Work as set forth in the Initial Information. The schedule shall **include allowances for periods of time required for the Owner's review, for the performance of the Owner's consultants, and for approval of submissions by authorities having jurisdiction over the Project.** Once approved by the Owner, time limits established by the schedule shall not, except for reasonable cause, be exceeded by the Architect or Owner. With the Owner's approval, the Architect shall **adjust the schedule, if necessary**, as the Project proceeds until the commencement of construction. (**Emphasis added.**)



"What Time is It"? Photo by Eric O. Pempus, DesignPro Insurance Group, 9.28.2021

And, the architect’s schedule is not the same as the contractor’s or the overall project schedule. However, if there is a strict project schedule that cannot be negotiated out by between the A/E and the project owner, the wisdom is that an A/E should at least notify their client if they anticipate that schedules will be falling behind. This would be good risk management, as a form of good client/professional communications.

IN CONCLUSION

“Time is of the essence” is a legal phrase often used to specify the time period in which one party **must** complete its contractual obligations to the other party. While the provision may seem harmless, and could be glossed-over, it should raise a red flag when reviewing a design professional services agreement. Failure to meet deadlines set in an agreement’s “time is of the essence” clause may elevate an A/E’s standard of care, and may result in a breach of contract.

According to “Construction Science” (educational degree courses of study that are analogous to construction management programs), the origin of the phrase “time is of the essence” comes from the building of the transcontinental railroad. While the project was considered impossible at the time of its construction (1862 – 1869), many people were sure that it would be done. And it was completed.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 15 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 34 years. As a Fellow of the American Institute of Architects and Chair/Hearing Officer of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group’s experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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November 19, 2021 – 12:00 pm – 1:00 pm

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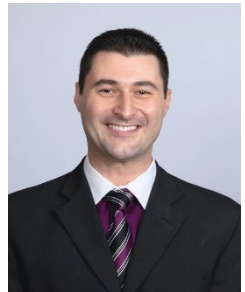
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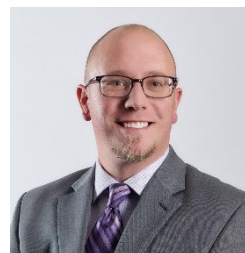
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